Sony Corporation of America *and* Local 888, United Food and Commercial Workers International Union, AFL–CIO

Sony Corporation of America *and* Elaine Green, Petitioner and Local 888, United Food and Commercial Workers International Union, AFL–CIO. Cases 22–CA–16874, 22–CA–17023, and 22–RD–984

November 24, 1993

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Issues presented for the National Labor Relations Board's review in this case are whether the administrative law judge correctly found that the Respondent committed unfair labor practices and engaged in objectionable preelection conduct by: (1) photographing employees and using their photos in an antiunion videotape without the employees' informed consent; (2) failing to furnish the Union with requested information about the photographing of employees and, further, giving a false and misleading response to the request; and (3) conducting a raffle in connection with a decertification election.[1] The Board has considered the decision and the record[2] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, except with respect to the election raffle issue, and to adopt the recommended Order as modified.

The Union has represented a multifacility unit of the Respondent's office and clerical employees for several years. On March 14 and 15, 1990,[4] the Board conducted a decertification election among employees in that unit. The tally of ballots cast in the election was 44 votes for and 76 votes against the Union.

About a week prior to the election, the Respondent announced that it would hold a raffle on March 16 for all unit employees who voted in the election. Employees were notified that they would receive a raffle ticket after they had voted. They would not be required to sign anything and no list of voters would be kept. The Respondent also expressly assured unit employees that ''[p]articipation is voluntary, and is not dependent on the outcome of the election or how you voted.''

The Respondent offered two company products as prizes in the raffle: a Sony 27-inch television set and a Sony Discman. The suggested retail prices of the television and Discman were $1299.95 and $279.95–$299.95, respectively, but Sony employees could purchase these items at corporate discount prices of $617 and $175.95. The Respondent regularly conducts raffles of its products and other prizes. For example, approximately 800 employees participated in a 1989 raffle which the Respondent held to encourage participation in a United Way campaign. Prizes for that raffle—car stereos, televisions, audio items, and hotel stays—cost the Respondent $1500.

The judge found that the value of the prizes offered in the March 16 raffle was so substantial that it interfered with the employees' electoral choice. She further found that the value of the television was itself so substantial that the Respondent violated Section 8(a)(1) of the Act by offering it as a raffle prize. We disagree.

> [T]he Board has held that the conduct of a raffle does not constitute a *per se* basis for setting aside the election. Rather, the Board will consider all of the attendant circumstances in determining whether the raffle destroyed the laboratory conditions necessary for assuring employees full freedom of choice in selecting a bargaining representative. Some of the factors considered relevant by the Board have been whether the circumstances surrounding the raffle provided the employer with means of determining how and whether employees voted, whether participation was conditioned upon how the employee voted in the election or upon the result of the election, and whether the prizes were so substantial as to either divert the attention of the employees away from the election and its purpose or as to inherently induce those eligible to vote in the election to support the employer's position.[5]

In the present case, the substantial value of the prizes offered by the Respondent is the only factor which even arguably coerced employees or interfered with their electoral choice.[6] In a number of cases, the

[1] On May 4, 1993, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent and the Union filed exceptions and a supporting brief. The Respondent and the Union filed answering briefs, and the Union filed a reply brief to the Respondent's answering brief.

[2] The Union's request for oral argument is denied as the record and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] All dates are 1990, unless otherwise indicated.

[5] *Grove Valve & Regulator Co.*, 262 NLRB 285, 303 (1982).

[6] Consequently, many of the cases cited by the judge in support of her decision are inapposite because they involve factors other than the substantiality of the raffle prize(s), standing alone. In *Houston Chronicle Publishing Co.*, 293 NLRB 332 (1989), and *National Gypsum Co.*, 280 NLRB 1003 (1986), it was significant that employees were required to identify themselves in the raffle. ''This information indicated to the Employer where additional campaign efforts should be focused and afforded the potential for directing pressure at particular employees.'' *National Gypsum*, supra. In *E. A. Nord Co.*, 276

Board has found that the raffle prize of a television, without more, was not so substantial as to warrant setting aside an election.[7] Concededly, there may be situations where the value of a raffle prize could be the sole basis for finding an election-related raffle unlawful or objectionable. However, the value of the television offered by the Respondent here, even when considered in conjunction with the value of the Discman, is not substantially greater than the value of the prizes in the cases cited above. In addition, the Respondent's employees are accustomed to raffles offering similar or greater prizes.

Cases in which the Board has found election-related raffles unlawful or objectionable based primarily on the substantial value of prizes offered have involved prizes of a far greater magnitude than here. For instance in *Grove Valve*, supra, the grand prize was a 7-day trip to Hawaii for two, with spending money. In *Smith International*, 242 NLRB 20 (1979), the grand prize was an all-expense paid trip for two to Hawaii or a family trip to Disneyland or Disneyworld. Accordingly, in the absence of evidence that the value of the election raffle prizes was so substantial as to coerce employees or to interfere with their electoral choice, we dismiss the complaint allegation that the raffle violated Section 8(a)(1) of the Act and we overrule related allegations in the Union's Objections 6 and 12.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sony Corporation of America, Mahwah, Teaneck, Paramus, Park Ridge, Woodcliff Lake, and Fort Lee, New Jersey, and New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Photographing its employees and including their photographs in antiunion videotapes without the employees' consent; refusing to furnish to the Union, as the exclusive collective-bargaining representative of an appropriate unit of the Respondent's employees, requested information which is relevant and necessary to the Union's representative duties, and giving a false and misleading response to the Union's request for information.''

2. Redesignate the paragraph following paragraph 1(a) as paragraph 1(b).

3. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT photograph our employees and use their photographs in an antiunion videotape without obtaining their informed consent.

WE WILL NOT refuse to give Local 888, United Food and Commercial Workers International Union, AFL–CIO, as the exclusive collective-bargaining representative of an appropriate unit of our employees, requested information which is relevant and necessary to the Union's representative duties, and WE WILL NOT give a false and misleading response to the Union's request for information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with relevant and necessary information when requested by the Union.

SONY CORPORATION OF AMERICA

Renee I. Crain, Esq., for the General Counsel.
G. Peter Clark, Esq. (Clifton, Budd & DeMaria), of New York, New York, for the Respondent.
Larry Cary, Esq. (Vladeck, Waldman, Elias & Englehard, P.C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. The charges here were filed on March 14 and May 17, 1990. Following the issuance of a complaint on July 30, 1990, and an amended complaint on April 19, 1991, a report on objections and an order consolidating cases was issued on May 31,

NLRB 1418 fn. 2 (1985), the fact that eligibility to participate in the raffle was limited to nonstrikers was a factor.

[7] *Stride Rite Corp.*, 254 NLRB 297 (1981); *American Induction Heating Corp.*, 221 NLRB 180 (1975); *Marathon LeTourneau*, 208 NLRB 213 (1974).

1991.[1] This case was tried in Newark, New Jersey, on November 18, 19, and 20, 1991. The record was held open to allow sufficient time for the parties to stipulate to the contents of a videotape and to the wages earned by unit employees. The stipulation of the parties was received into evidence and the record here was closed on June 25, 1992. Briefs were submitted on July 31, 1992. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, photographed unit members for use in an antiunion campaign videotape, refused to furnish the Union information it requested concerning the reasons for photographing employees, and conducted a lottery which diverted attention from the decertification election. Respondent denies that it has violated the Act.

In the representation case, a decertification election was conducted on March 14 and 15, 1990. Excluding the 14 challenged ballots, which are not sufficient in number to affect the election results, the vote was 44 for and 76 votes against union representation. The Union filed timely objections, and Objections 1, 2, 3, 6, 8, 9, and 12 and are at issue here.[2]

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following[4]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with offices and places of business in Mahwah, Teaneck, Paramus, Park Ridge, Woodcliff Lake, and Fort Lee, New Jersey, and New York, New York, is engaged in the manufacture, sale, and distribution of electronic products and related goods.[5] Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

It is undisputed that since at least 1978, the Union has been the designated exclusive collective-bargaining representative of the employees in the following unit and has been recognized as such by Respondent:

> All full-time office and clerical employees employed by the Respondent at its Mahwah, New Jersey; Teaneck, New Jersey; Paramus, New Jersey; Park Ridge, New Jersey; Woodcliff Lake, New Jersey; Fort Lee, New Jersey; and 9 West 57th Street, New York, New York locations, but excluding all private secretaries, salesmen, executives, professional employees, managers, confidential employees, guards and supervisors as defined in the Act.

Respondent and the Union have been parties to a series of collective-bargaining agreements, the latest of which expired on March 31, 1990. In November 1989, a deauthorization election pursuant to Section 9(e) was conducted among the unit employees. The vote was 56 against and 49 for deauthorizing the Union. About 14 unit employees did not vote in this election.

The instant proceeding concerns events relating to the decertification election conducted on March 14 and 15, 1990. There is no dispute that prior to the decertification election Respondent arranged for still photographs of virtually all unit employees to be taken while the employees were at their work stations, seemingly engaged in their normal jobs during working times.[6] These photographs were subsequently used in a videotape shown to the unit employees about 2 days prior to the election.[7] The videotape presented Respondent's position on the subject of union representation and it urged unit employees to vote against representation in the upcoming election.

2. Management arrangements for photographing employees

Alfred Hayes, Respondent's vice president for benefits and administration, testified that he manages employee benefit plans, keeps employee records, and conducts union relations. Hayes has negotiated with Local 888 and administered the contract for about 15 years. He testified that since the filing of the deauthorization petition he has spent about 25 percent of his worktime on union business. At the time of the events material to the instant case, Hayes was Respondent's chief negotiator and was responsible for handling grievances, arbitrations, and problems relating to the Union.

Hayes stated that prior to the day of the decertification election Respondent's labor counsel, Alfred T. DeMaria, suggested the creation of a campaign video for use by Sony. DeMaria found a production house to make the film and he had the idea to use photographs of unit employees in the video. Hayes testified that he informed his superior, Vice President and Human Resources Manager John Stern, and that Stern approved. Hayes stated that it was important to use the photographs of unit employees in the film.[8] In addition to showing the videotape to employees, Sony sent each unit employee approximately 24 different leaflets setting forth the position of the Company in favor of decertifying the Union.

Hayes testified that he instructed Dolores DePiero, the supervisor of the human resource information center, to obtain pictures of the approximately 140 unit employees.[9] DePiero was to attempt to obtain still photographs of just about all the unit employees except for six who were employed in the

[1] Various motions were filed by Respondent after the issuance of the complaint and before the holding of the instant hearing.

[2] The Union withdrew Objections 7 and 14 at the hearing.

[3] Certain errors in the transcript are noted and corrected. C.P. Exh. 2 (Union) is admitted into evidence.

[4] Respondent also filed and served a memorandum concerning copyright.

[5] The employees often use the name SONAM to refer to Respondent when speaking among themselves.

[6] The photographs were taken on March 1 and 2, 1990, at all the New Jersey locations. Very few employees work at Nine West 57th Street in New York City.

[7] The presentations, described below, were mostly conducted on March 12, 1990.

[8] Hayes had played a similar role in formulating campaign strategy for the deauthorization election.

[9] Respondent had a total of about 1800 employees in March 1990.

New York City location. It was up to DePiero to tell the photographer which employees were to be photographed. According to Hayes, DePiero and the photographer knew why they were taking the still pictures. Hayes stated that he instructed DePiero that she and the photographer were not to inform the unit employees what their pictures were actually going to be used for; if questioned by employees, DePiero and the photographer were supposed to make something up.[10]

Hayes said that the Company did not tell unit employees their pictures were being taken for use in a campaign videotape because ''people in general are interested in seeing themselves in a videotape, they enjoy it, they get a kick out of it. And we wanted the surprise effect, obviously to keep their attention to the video tape.'' On cross-examination, Hayes said he did not know if a union shop steward would ''get a kick out of'' seeing herself on an antiunion film, but he insisted that generally people like to see themselves on video. Hayes agreed that a shop steward would be surprised to see her picture in the tape. I find Hayes' testimony here quite disingenuous: a person with 15 years' experience in dealing with the Union cannot reasonably maintain that he could not know whether a union shop steward would likely ''get a kick out of'' seeing herself in an antiunion videotape shown by the Company just prior to a vigorously fought decertification election. Eventually, Hayes conceded that if the union shop stewards had been told what the pictures were going to be used for they probably would have objected and possibly they would have complained to the Union. Hayes stated that he did not intend to tell the Union what use he was going to make of the photographs. Further, although Hayes maintained that in general people like to see themselves on a videotape, not one of the 140 unit employees of Respondent testified here that she or he did in fact enjoy being surprised by the inclusion of a photograph in the Company's film. I find no basis in Hayes' testimony for concluding that any unit employee enjoyed the experience.

Hayes testified that posing for photographs was not part of the job duties of unit employees and that the Company had no policy to discipline unit employees if they did not want their pictures taken. After DePiero had gone around to Respondent's various facilities in New Jersey, she reported to Hayes that one person, a unit employee named ''Sandy,'' had refused to have her picture taken.

Dolores DePiero testified that Hayes told her to escort the still photographer around to the various buildings to take pictures for inclusion in a campaign videotape for the election. Hayes instructed her not to tell employees why the pictures were being taken; ''we wanted to see them surprised.'' As DePiero described the procedure she used, she and the photographer would enter a facility, present themselves to the manager in charge and ask where the unit employees worked. DePiero told the managers that pictures were being taken for a video; she did not recall whether she told any of the managers what the video was for, but if any of them had asked, she would have informed them of the purpose. As DePiero and the photographer went around to the clerical work stations, according to DePiero, the photographer would do most of the talking and say that they were taking some pictures and ask if that were all right. DePiero stated that she did not tell any employees that the reason they were being photographed was for inclusion in a videotape and DePiero said that it was not her intention to give them this information if they asked.

On direct examination by counsel for Respondent, DePiero seemed to remember quite a bit about the visits to the New Jersey facilities on March 1 and 2, 1990, even though she was testifying in November 1991. DePiero recalled that she and the photographer first went to Mahwah, and that when the photographer told unit employees that they were there to take some pictures the employees said that was fine. If any employees were reluctant, according to DePiero, it was because they needed lipstick or their hair was not combed. DePiero testified that no employees objected and that the picture taking took about 15 minutes. DePiero then recalled that at the Teaneck facility the process similarly took 15 minutes and that no employees objected to being photographed. At the Paramus facility, according to DePiero, employees ''were fine.'' One employee asked why the pictures were being taken, and DePiero answered that she was from headquarters and had been asked to take some pictures. No employees objected during the 30 to 40 minutes that she and the photographer spent on the premises. DePiero denied that she told any employee the photographer was merely using up film and she denied that he asked any employee to pose in a certain fashion. In fact, DePiero stated, some employees asked the photographer if they could pose. DePiero recalled the visit to Park Ridge and that one employee asked what the pictures were about. DePiero responded that she and the photographer were from headquarters. One employee did not want her picture taken because her hair was messed up and she was not photographed. DePiero testified that the session at Park Ridge took about 45 minutes. She did not tell employees that the photographer was just using up his film. At the Tice Building in Woodcliff Lake, DePiero recalled that Shop Steward Nina Ciravolo asked why she and the photographer were there. DePiero replied that they had been sent by headquarters. She did not tell the employees present that the pictures would be included in a video because she wanted to surprise them. DePiero recalled that Ciravolo applied some lipstick before her picture was taken and that she did not object to being photographed. DePiero knew Ciravolo because the two had been in contact on prior occasions, and DePiero knew that she was a union shop steward. According to DePiero, she and the photographer spent 45 minutes at the Tice Building.

On cross-examination, DePiero's memory was less forthcoming. When she was questioned about the specific basis for her testimony on direct examination, DePiero testified that she could not recall what each individual employee had said to her nor what she had said to all the employees she spoke to during the photography sessions held over the 2-day period. DePiero stated that she could not recall how many employees she spoke to at any facility and she could not recall the names of the employees. DePiero acknowledged that the photographer took pictures of about 150 people and that he took up to three pictures of each individual. She stated that he never told anyone how to sit or stand although he

[10] Hayes testified that he told DePiero not to force or coerce employees because the picture taking was voluntary. Further, he told her to photograph the members of the Union as they normally would be during the workday. Since Hayes was not present while the photographs were taken, he could not testify what actually took place during the process.

may have told employees to smile, but she also stated that she could not remember.

DePiero testified that it is normal to see photographers walking around the company premises taking pictures of employees and that ''different photographers are all over snapping pictures.'' When questioned about how many occasions she had witnessed during her 7-year period of employment with Respondent, DePiero recalled that she had seen an employee photographed for a company newspaper once or twice. DePiero further testified that if an employee is photographed for inclusion in an employee newspaper, the employee will be told what use is going to be made of the likeness. DePiero stated that she has seen videotaping on company premises once or twice but she could not furnish any details at all about those purported events.

Antonina Ciravolo, a data entry employee at the Tice Building in Woodcliff Lake, has been a union shop steward for 6 years. Ciravolo testified that in March 1990 she was working at her desk when she became aware that a photographer, accompanied by DePiero, was taking pictures of employees in her area. Ciravolo asked why the photographs were being taken; the two responded that they were just taking pictures in general. Ciravolo was not informed of the purpose of the photography and she was not asked permission for her picture to be included in a videotape. Ciravolo testified that she did not consent to have her photograph used in the company video.

Gloria Chormanski, an accounts receivable bookkeeper at Paramus, has been a union shop steward for 7 years. In early March 1990, Chormanski testified that Supervisor Ginny Granuzzo and a man and woman came into her workplace. The supervisor said that they were there to take her picture. When Chormanski asked how come, the supervisor said they were taking pictures of the salesmen and that they had extra film which they wanted to use up. Chormanski testified that she never consented to have her likeness used in the company videotape. One of the three visitors told Chormanski to sit at her desk and look like she was doing something. Chormanski recalled that three pictures were taken of her. She also recalled that employee Marie Scelzo did not want to have her picture taken until a group photograph was suggested; Scelzo agreed and Chormanski also posed in the group. After this session, Chormanski received a telephone call from unit employee Sandy Czyrnick in Park Ridge. Czyrnick asked Chormanski whether she knew that unit employees were being photographed. Chormanski replied that her own picture had been taken but that she did not realize that the photography was limited to unit employees. Czyrnick said that her supervisor had instructed employees to stay in their department because pictures would be taken. Czyrnick, not wanting to be photographed, had left. Chormanski testified that Czyrnick sounded upset and that she told her she would telephone the union representative.[11]

Shirley Shears, an account service representative in Teaneck, has been a union shop steward for 6-1/2 years. Shears recalled that she was sitting at her desk discussing some information with another employee when two supervisors accompanied by a photographer approached them. The three said that they were doing a project and that they had some film that they wanted to use. Shears told them that she did not want to be photographed. Her own supervisor, Joan Sheppard, said, ''come on, let's take a picture.'' Shears continued to refuse and then her phone rang. When Shears finished her telephone conversation, the discussion about the photographs continued and she finally gave in. Shears was instructed to pick up a paper, speak to the other employee as though they were discussing a matter, and then to smile. One or two pictures were taken. Unit employee Debbie Corbo was also present and she stated that she did not want her picture taken. Corbo was urged by the three visitors to have her picture taken. They said they just wanted to use up the film; ''they were working on a project and they had been taking pictures of everyone, not just us.''

Yolanda Roberts, an accounts receivable bookkeeper in Paramus, is a member of the Union. Roberts testified that on March 1 Ginny Granuzzo, the manager of her facility, came into her office with a photographer. Granuzzo told Roberts that they wanted to take her picture. When Roberts asked the purpose of the picture, Granuzzo replied that they were using up some film which they did not want to discard. Roberts agreed to be photographed. The photographer told her to hold her head down and look very busy and for the next picture he instructed her to look up at the camera and smile. Then the photographer took a picture of Roberts in a group with fellow employees Marie Scelzo and Gloria Chormanski.[12]

3. Union inquiry concerning the photographing of unit employees

James Lucas is the president of Local 888. Lucas testified that in March 1990, he received a number of telephone calls about the photographing at Sony. Shirley Shears called him and stated that pictures were being taken at the workplace and that she was getting calls about this. Shears was upset because she did not know why the pictures were being taken. Another shop steward called with a similar complaint. Finally, Business Agent Lonnie Warsaw called and said he had received complaints that the Company was taking pictures of all the union people. Lucas called Al Hayes. Hayes was not available but he returned Lucas' call about 1 hour later. Lucas told Hayes that he was receiving telephone calls from Sony employees about the pictures being taken at the various locations. Lucas asked Hayes what was going on and what he was trying to do. Hayes responded, ''Jim, believe me, it's nothing, this is routine, it's nothing to this.'' Lucas replied that he had never heard of picture taking before and that he hoped Hayes was not playing games. Hayes again reassured Lucas that it was only a routine matter. Lucas stated that he does not usually speak directly to Hayes but that on this occasion he called the latter because he was concerned about the decertification effort and the Company's tactics.

Hayes recalled speaking to Lucas. Hayes testified that Lucas asked why the employees were being photographed and he replied to Lucas that this was a routine function and that employees were photographed for orientation, training, company newspapers, and the like. Hayes testified that he did not intend to tell the Union what the pictures were for

[11] Chormanski then called Union Representative Lonnie Warsaw and told him that pictures were being taken at Paramus and Park Ridge. Warsaw said that he would check it out.

[12] At one point, Roberts heard Scelzo telling the photographer that she did not want her picture taken.

although he acknowledged that he was aware at the time that it would be important for the Union to know the purpose of photographing unit employees. Hayes denied that he lied to Lucas, saying, ''I don't consider it lying to him, he had no right to the information.'' However, Hayes admitted that he did not tell Lucas that he had no right to the information. Hayes also admitted that he did not know of any bargaining unit employees whose photographs have been used in training films or orientation films. When the Company uses employees' pictures for commercial purposes, it obtains proper releases from the employees. No bargaining unit employee has signed such a release. Hayes testified that two Sony employees from a facility in Hawaii had speaking roles in the video that was shown to unit employees. Those two employees were informed that their voices and likenesses would be used in an antiunion video to be shown in New York and New Jersey. Hayes also testified that when employees are photographed for an employee newspaper or for training or orientation films they are told the purpose of using their pictures. According to Hayes, he did not provide the same information to the unit employees who were photographed because he wanted to surprise them. Hayes volunteered that the surprise effect on unit employees of seeing their pictures in the video 2 days before the election was considered in the discussions with DePiero and Attorney DeMaria.

4. Presentation of the video in meetings with unit employees

A few days before the decertification election, Respondent showed the videotape to its employees in meetings held at their work locations during working time. A memorandum instructing unit employees to attend the meetings had been distributed to each employee; the memo set forth the time and place of the meetings.

The videotape runs for about 30 minutes; it consists of about 27 minutes of spoken material and about 3 minutes of employee photographs accompanied by a song or by music. During the 27 minutes of spoken material, still pictures of unit employees are shown at various points.

The narration begins by stating in detail Sony's argument that employees no longer need unions because they have the protection of various laws and that in consequence union membership is declining. According to the narration, many companies such as Respondent are treating their employees better than before, and this is a reason for employees to vote the Union out. While refraining from making promises of increased benefits if the Union is decertified, the narration promises that ''you will not lose'' if the Union is decertified. The narration continues for several paragraphs in a discussion of the asserted misrepresentations and ''just plain lies'' being spread by the Union ''to scare you into continuing to pay dues.'' Seeking to counter the fears of employees, the narration states that the Company will not adversely change their conditions and will not ''punish'' them ''when they decide they no longer want to belong to a union, as the union and some of the shop stewards want you to believe.'' The videotape then presents two company employees from Honolulu who discuss the fact that they decertified their union and that, since their benefits remained the same, ''we are so happy that we got out of the union.'' Summing up this point, the narration continues, ''The bottom line is this: even though the union and its supporters are tying to mislead you, a union contract is no guarantee of better things.'' The videotape continues with the Company's assertion that dues are expensive. Then the film examines in detail the benefits enjoyed under the collective-bargaining agreement and compares them to benefits of nonunit employees; in certain areas bargaining unit employees have gotten less and the narration then rebuts what ''your union officials are trying to tell you.'' The tape goes on to counter purported lies told the unit employees about their pensions ''by people with a vested interest in keeping the union in, for themselves.'' The video then repeats many of the points made before, referring repeatedly to the asserted misrepresentations made by the ''union'' and ''the union stewards.'' Continuing, the narration urges employees to vote:

> Since the union stewards and union supporters will be getting out the union vote, not voting will be like voting to keep the union. So, be sure to vote.''
>
> And to add a little incentive to everyone to vote, the company is having a drawing for all those who do vote. First prize is a new TV made by the best TV maker in the world. Second prize is a CD player made by the best CD player maker in the world. Again, you don't have to sign anything. You just have to vote. Besides the TV or the CD player, you've got a lot of reasons to vote and a lot of reasons to vote no.

The videotape goes on to exhort the employees to work as a team and tells them to choose a nonunion situation characterized by ''trust and honest communications.'' It asks the employees to consider whether they want to be represented by a union that ''spread lies.'' The narration concludes shortly thereafter by saying, ''Vote no.''

Following the narrated portion of the videotape, a portion lasting about 3 minutes shows approximately 85 still photographs, most of which are of bargaining unit employees. For the first 90 seconds of this portion, there is music and a song and 32 photographs are shown. For the last 90 seconds, there is only music and 53 photographs are shown. Among the pictures of bargaining unit employees are those of Union Shop Stewards Chormanski, Ciravolo, and Shears, and of unit employee Roberts. Two pictures of Roberts and Chormanski are shown. The parties agree that nonunit employees are shown including one temporary employee, one secretary, and two supervisors. The lyrics of the song express the idea that although Sony employees have a lot of work ahead they have a good job and ''now we've got a guarantee, That we won't lose if we decertify, and that's enough for me.''

Hayes testified that he was present when the videotape was shown to unit employees at Paramus. He offered no substantive testimony about this occurrence.

When cross-examined about the matter, DePiero stated that Hayes showed her the videotape before it was presented to the unit employees. However, she could not recall anything about her conversation with Hayes even though she was to present the video to the employees soon after viewing it with him. In contrast, when questioned on direct by counsel for the Respondent, DePiero professed to recall many details about the meetings where she showed the tape to unit employees. DePiero testified that at the Tice Building the employees were excited about seeing themselves on the video

and no one expressed any dissatisfaction. The employees were very surprised when they saw their photographs in the film. DePiero stated that Union Shop Steward Ciravolo was not upset to see herself in the videotape; she was happy and thrilled. When cross-examined, however, DePiero could not recall whether she said anything to the employees before the video was shown, she did not know if she was the first one to speak after the film was completed and she did not know if there were questions. However, DePiero volunteered that people were laughing while the video was being run and that the meeting was very light and jovial. After being prompted to recall that she answered employees' questions about their continued rights to their pensions, sick leave, and vacations if the Union lost and asked whether she answered in a joking manner, DePiero indignantly stated that as a member of the human resources department she answered these questions seriously.

Ciravolo testified that at the meeting where the video tape was shown to unit employees, the Company gave out certificates guaranteeing that employees would be granted the same benefits if they decertified the Union as they had enjoyed under the collective-bargaining agreement.[13] Ciravolo stated that as a shop steward she was embarrassed to see her own photograph used in the Company's video. After the film, there were a few questions and answers but Ciravolo recalled that she ran out of the room and back to her desk because she was so embarrassed to see her picture.

Chormanski saw the videotape at Paramus a few days before the election. Management showed the film and after it was completed conducted a question-and-answer session. Chormanski saw three pictures of herself in the video. As a union shop steward she was surprised that her likeness had been used in an antiunion film and she did not make any statements nor ask question at the meeting because she was nervous and embarrassed. She had not been told that her picture would be used in an antiunion video. All the employees were talking about the video and three or four of them asked her what she was doing up there as a shop steward. Chormanski responded, ''I was just as shocked as you are because I didn't know . . . they were going to use it for that.'' Chormanski could not tell her fellow employees what she was doing in the video.

Roberts also saw the videotape at Paramus. During the question-and-answer session, management distributed certificates stating that employee benefits would not change if the Union were decertified. Roberts stated that two pictures of her were used in the videotape: the photograph in which Roberts had been instructed to pose with her head down was shown first and then the photograph in which Roberts had been instructed to look up and smile was shown when the narrator of the film said that employees would be happy without a Union. Roberts testified that she was shocked to see her picture in the video. Roberts supports the Union and people were asking Roberts why her picture was used in the video. According to Roberts, the message conveyed by the video was that employees were happy that the Union was being decertified. Roberts did not speak out in the meeting to ask why her picture had been used because she was afraid to ask that question.

Shears saw the video in Teaneck. After the meeting, she received a call from employee Denise Wirchansky in Mahwah.[14] Wirchansky said the employees had been discussing the film and they wanted to know why Shears participated in a film that seemed to be antiunion when Shears was a shop steward. Shears replied that she had not been told that her photograph would be used for a film.

5. The election raffle

Respondent conducted a raffle in connection with the decertification election. Employees were informed of the raffle by a one-page announcement headed ''TO ALL OFFICE AND CLERICAL EMPLOYEES, MEMBERS OF LOCAL 888.'' In bold type, another heading stated, ''A Sony Black 27'' TV and a Discman Will Be Raffled Off On Friday, March 16.''[15] The text of the flyer stated that after the employees voted they could obtain a raffle ticket from someone sitting in the reception area at each office. Employees would not be required to sign anything to be eligible for the raffle and no list of voters would be kept. ''Employees who voted in the election, who present [a winning ticket] will be the winners. Participation is voluntary, and is not dependent on the outcome of the election or how you voted.'' The announcement did not explain how the Company would be able to prevent unit employees who did not vote from obtaining raffle tickets in the absence of lists of voters.

This announcement was mailed directly to the homes of unit employees a week before the election; it was also posted on workplace bulletin boards.

Several witnesses testified that Respondent regularly conducts raffles of various Sony brand products and other prizes for its employees. At Christmas, a party is held for all employees, including supervisors and managers, and all those who attend are automatically entered in a raffle which offers prizes ranging from televisions and video cameras to audio tapes.[16] About 1300 to 1400 employees participate in the Christmas raffles. There is a summer picnic each year; any employee who attends is automatically entered in a raffle for various prizes. Whenever the Company participates in a United Way campaign, it encourages its employees to contribute by entering any employee who makes a donation in a raffle. The cost of the raffled items to Respondent in 1989 was $1500; the prizes included car stereos, televisions, hi-fi items, and hotel stays. About 800 employees participated.

Hayes testified that the Company conducted the election raffle because it wanted employees to participate in the election. Hayes recalled that in the deauthorization election, the Company campaigned vigorously; management was aware that the outcome depended on getting the majority of unit members to vote to deauthorize. Hayes stated that in the earlier election if an employee did not vote that amounted to

[13] This guarantee is signed by the president and executive vice president of Respondent and it provides: ''On behalf of Sony corporation of America, we hereby guarantee employees covered by the Local 888 contract that the Company will not reduce the value of their salary and fringe benefit package as a result of decertifying the union.''

[14] As a shop steward, Shears is responsible for the Mahwah location.

[15] The prizes were further identified as a Black KV27HSR10 TV and a D2K Discman.

[16] In 1986, the Christmas raffle prizes included six hand-held televisions, 12 13-inch televisions, a stereo, and a trip to the Super Bowl. The 1987 raffle was similar.

a vote against deauthorization. In contrast, Hayes knew that in the instant decertification election, the outcome depended only on the number of employees actually voting. Hayes did not explain why the Company did not use a raffle to get out the vote in the earlier deauthorization election, yet it used one in the instant decertification election.

All of Respondent's employees have access to a number of company stores where they can purchase both Sony brand and non-Sony products at discount. In addition, employees can order available products by mail. The price charged to employees is about 90 percent of the price Sony charges its dealers for the same items. Respondent's employees can determine the suggested retail price and the discounted cost to them of any item they wish to purchase by using computer terminals to which they have access; the computer will print out the list price of each item and the discounted employee price. The January 1, 1990 Dealer Price List published by Sony to its dealers stated that the ''Suggested Retail'' price of the TV was $1299.95 and that the ''Dealer Cost'' was $758. The ''Suggested Retail Price Range'' of the Discman was ''$279.95 to $299.95 and the ''Dealer Cost'' was $199.95. The computer information available to employees showed that the list price for the Discman was $279.95 and that the price to them was $175.95. The record shows that the television was available to employees at a cost of $617.

The unit employees eligible to enter the raffle are eligible to work overtime at a rate of 1-1/2 times straight time for all hours worked in excess of 7-1/2 hours each day. The parties agree that the average (mean) weekly pay for these employees as of August 1990 was $385.43, which represents an average (mean) hourly rate of $10.28.

Employee Yolanda Roberts testified that as she was on her way to vote in the decertification election, she passed a woman handing out raffle tickets in the hallway. When Roberts and other employees asked about a raffle ticket, the woman responded that one had to vote in order to get a ticket. Shop Steward Ciravolo testified that she was an observer during the election both at Woodcliff Lake and at Park Ridge. At each location, about one-half of the voters who came up to vote asked out loud where they could get the raffle tickets for the television set.[17] Shop Steward Chormanski testified that she was an observer during the election at Paramus. According to Chormanski, a number of employees voting that day asked the Board agent where they would get their tickets for the raffle.

B. *Discussion and Conclusions*

1. Credibility of the witnesses

As discussed above, I found certain portions of Hayes' testimony evasive and disingenuous. I observed that Hayes was uncooperative on cross-examination. Although Hayes is an expert in labor relations and has dealt with the Union for 15 years, he professed himself unable to answer whether a union shop steward would enjoy the surprise of seeing herself on an antiunion videotape. Further, Hayes conceded that when Union President Lucas telephoned and asked why pictures of bargaining unit employees were being taken, he told Lucas that it was routine and mentioned orientation and training materials and company newspapers. In fact, the record shows that the photography was anything but routine. Company practice in the past had been to inform employees of the purpose for taking their pictures, and Hayes stated that to his knowledge no unit employees had been photographed in the past for orientation or training purposes. Hayes acknowledged that the true facts would have been important to the Union at the time; he said he did not consider that he was lying to Lucas because in his opinion Lucas had no right to the information. I observed carefully Hayes' demeanor as he was being questioned on this matter and I formed the impression that Hayes arrogates to himself the decision whether to tell the truth or not depending on how the particular circumstances appear to Hayes. Further, Hayes told DePiero and the photographer to conceal the truth from the unit employees if they wished to know why their pictures were being taken. Hayes conceded that he told the two to ''make something up.'' I observed that Hayes showed no unease nor compunction about admitting that he instructed DePiero to lie to about 140 of her fellow workers; he seemed not to understand why such a fuss was being made about whether the truth was told to his subordinates. Based on my observation of Hayes and on my analysis of his testimony, I have determined that Hayes is not a credible witness. I am particularly mindful that Hayes is aware of the importance others place on the telling of lies: the videotape made with his assistance and which he personally presented to employees at the various meetings emphasizes repeatedly Respondent's position that the Union and its shop stewards were telling just plain lies to the employees. Thus, I conclude that Hayes' use of untruthfulness is deliberate. I shall not rely on Hayes' testimony where it is contradicted by other evidence.

As discussed above, I found that DePiero had a selective memory. She recalled very well the answers to questions posed by counsel for Respondent but she was unable to recall much about contemporaneous events inquired into by counsel for the General Counsel and counsel for the Charging Party. Thus, she was uncooperative and not forthright on cross-examination. Further, DePiero testified in generalities that she was unable to back up with specific facts. She stated that photographers were often all over company premises snapping pictures, but she could recall only one or possibly two actual instances in the last 7 years. DePiero professed to recall that employees were thrilled and excited to see themselves in the video, but when cross-examined, DePiero could not recall what she said before the video was shown and what happened after the video was over. It was only when prompted by leading questions that DePiero began to recall some details that opposing counsel wished to inquire about. Because DePiero seemed willing to recall only those matters that assisted Respondent's view of the case, I find that she was not a reliable witness. Further, I have considered the fact that DePiero willingly spent 2 days directing the photographing of 140 of her fellow workers, some of whom she knew personally, while assiduously hiding from them the purpose of the picture taking and making something up when they asked what the pictures were for. This willingness to lie repeatedly to accomplish Respondent's goals further persuades me that DePiero cannot be considered a credible witness. I shall not rely on DePiero's testimony where it is contradicted by other evidence.

[17] At Park Ridge, the Board agent responded that this was no time to ask us these questions; the employees were there to vote.

I found all the other witnesses here to be forthright and cooperative and I formed the impression while observing them that they tried to recall the facts and provide answers to the best of their abilities. I shall credit the testimony of these witnesses.

2. Photographing the employees

The General Counsel contends that photographing employees at their work stations without their permission for the purpose of incorporating the pictures in the Company's antiunion videotape infringed on employee Section 7 rights in two ways; by expropriating the images of prounion employees and creating the illusion that they were antiunion and by denying the employees the right to have other employees know about their support of the Union.

Respondent argues that employees were not coerced into having their pictures taken and that they all did so voluntarily. I reject this contention. Although a number of employees asked why they were being photographed, it is admitted that not one of the 140 unit employees was told the true purpose for taking the photographs and that none of them knew the pictures would be used in a company video about the decertification election. It is axiomatic that there can be no consent if there is not an informed consent.

It is not disputed that the videotape was an antiunion presentation; the tape delivered the message that employees would be better off without the Union; it asserted repeatedly that the Union was telling unit employees lies to convince them to vote against decertification; and it contained an interview with two Sony employees in Hawaii who said how happy they were now that they had decertified their former union in that location.

Thus, without their consent, unit employees had their pictures used to give seeming approval to the Company's antiunion message. The employees were not asked whether they wished to subscribe to the antiunion message and were presented with a fait accompli after the video was shown to them and to the other unit employees. In essence, the tape was the visual equivalent of placing the employees' names on a written antiunion document and circulating it to all the other unit members. The unit employees here had the right to assist and support the Union if they so desired; Respondent interfered with that right by using their pictures without their consent to convey an antiunion message.

By concealing the true purpose of taking pictures, the employees' likenesses were used without their consent in a videotape which made it appear that they did not support the Union. Those employees who did in fact support the Union were thus coerced into seeming to agree to Respondent's antiunion message as conveyed in the videotape. The element of surprise, repeated over and over in Hayes' and DePiero's testimony, was key to Respondent's strategy of making it appear that even shop stewards did not support the Union and favored decertification. By using their likenesses, Respondent deprived union supporters of their freedom to disagree.

Inherent in the employees' right to support the Union is the right to inform other employees of their support and to seek to persuade them to join in supporting the Union. Both Hayes and DePiero testified in connection with the film that the element of surprise was very important; Hayes testified that when he and DeMaria and DePiero discussed the video they recognized the importance of surprising the unit employees with their photographs in the videotape. Although Hayes and DePiero said the reason for the surprise was to keep the employees' attention riveted to the video, there is another likely and reasonably foreseeable result of surprising the employees with their photographs in the film. Those employees who might wish to speak out in support of the Union would be hesitant to do so after seeing their pictures in an antiunion presentation. First, the surprise showing of a photograph to contradict the known views of the union supporters whose pictures were used would tend to show them and all the other employees that they were powerless to express their beliefs in the face of the Company's wishes; the ability of the Company to use their pictures would reinforce the feeling of futility in speaking out. Second, the reasonably expected reaction of a union adherent after being surprised by her own photograph appearing in an antiunion film 2 days before the election would be embarrassment, confusion, and an inability to explain how she came to be used in that way. This confusion would reasonably tend to inhibit the union supporter from speaking in any of the meetings where the video was shown. An unauthorized use of one's own likeness to combat one's beliefs can reasonably be expected to lead the victim of this sort of trick to feel unable to respond immediately; the humiliation of being victimized and used in this way would silence all but the most hardy and outspoken.[18] Third, the emphasis in the film on the supposed ''lies'' being told by the Union and the shop stewards accompanied by pictures of these very same shop stewards would reasonably tend to silence them in the last 2 days of the campaign. In fact, the testimony shows that this is exactly what happened.[19]

Ciravolo said that as a shop steward she was so embarrassed to see her own photograph used in the Company's video that during the question-and-answer period after the film was shown she ran out of the room and back to her desk. Chormanski testified that as a shop steward she was surprised at the use made of her picture and as a result she was too nervous and embarrassed to speak at the preelection meeting. Chormanski did not know what to say to the several fellow employees who asked what, as a shop steward, she was doing in the film; she could only respond that she was just as shocked as they were. Union supporter Roberts was shocked to see her photograph in the video; she did not speak out in the meeting because she was afraid to ask why her picture had been used. The testimony of Roberts and Shop Stewards Shears and Chormanski establishes that other employees talked about the presence of known union supporters among those whose photographs were used in the antiunion video and that they wanted to know why the pictures were there.

[18] My observation of the unit employees who testified in this proceeding was that they were all reticent and reserved; none of these ladies was equipped for rough and tumble argument nor to respond indignantly when tricked by her employer.

[19] Hayes' testimony establishes that it was important for the video to feature as many pictures of the actual unit employees as possible and that the Company wanted to use the element of surprise 2 days before the election. Thus, Hayes' testimony establishes that Respondent was well aware that the likely result of employees' pictures being shown as part of an antiunion video was to silence to some extent the voices of those who would urge their fellow employees to vote in favor of the Union.

The Supreme Court has recognized the power of the ''outward manifestation of support'' on employees in a preelection campaign, and the Court has disapproved of a method whereby the union bought employee signatures to ''paint a false portrait of employee support during a campaign.'' *NLRB v. Savair Mfg. Co*., 414 U.S. 270, 277 (1973). In the instant case, the Company did not buy employee signatures but it tricked employees into posing for pictures to incorporate into its antiunion film; Respondent thereby was enabled to paint a false picture of employee desires to decertify the Union. This trickery coerced prounion employees into giving an outward manifestation of support to the decertification effort and interfered with their right to support the Union.[20] Further, including the employees' pictures in an antiunion video where they seemed to support the antiunion words of the film and the final jingle would impermissibly place any employee who wished to disassociate herself from the video message in the position of having to declare herself as to union sympathies. *Lyon, Inc*., 145 NLRB 54, 76 (1963), enfd. 341 F.2d 301 (5th Cir. 1965).

Respondent urges that the employee pictures in the videotape do not perform the function of supporting the film's antiunion message, but are for the purpose of tying the video to the workplace. Having seen the videotape, I find that a viewer could reasonably conclude that the laughing and smiling photographs of unit employees whose faces appear during the film, and especially during the final antiunion jingle, were meant to show support for the antiunion message of the film as a whole. A viewer could reasonably receive the message that unit employees were laughing and smiling because they were getting rid of the Union as suggested by the entire film and by the words of the song.

Nu Skin International, 307 NLRB 223 (1992), cited by Respondent, does not support Respondent's position. In *Nu Skin*, the Board found that ''the Union's photographing of employees enjoying a voluntarily attended [Union] picnic'' was not objectionable conduct: the pictures would not reasonably lead to fears of retaliation, and employees who asked why photographs were being taken were told that the photographs might be published and that they were to help remember the day. These explanations were found by the Board to be true.

I find that Respondent violated Section 8(a) (1) of the Act when it used unit employees' photographs without their consent in its antiunion videotape shown 2 days before the decertification election.

3. Denial of information to the Union

The General Counsel contends that the information requested by Lucas was necessary for and relevant to the Union's performance of its function as the representative of the employees as that information related to terms and conditions of employment. The General Counsel urges that photographing employees at their work stations affects the employees' terms and conditions of employment and that the Union has a general statutory right to learn the reason for photographing the employees. The General Counsel maintains that the employees were photographed without their informed consent during working hours and after they were instructed to pose as if they were engaged in the performance of their normal duties. The General Counsel points out that the purpose of the picturetaking was ultimately to erode the status of the Union. When the Union received complaints from the employees that they were being photographed and the Union sought information as to the purpose of taking the pictures, it was not given a true answer and it could not make an informed decision whether the collective-bargaining agreement had been violated and whether it ought to invoke the grievance procedure. Thus, the General Counsel concludes that the Union was forced to engage in the ''blind man's bluff'' described in footnote 8 of the the Supreme Court's decision in *NLRB v. Acme Industrial Co*., 385 U.S. 432, 438 (1967).

In *Acme*, the Court held that information requested by a union in order to decide whether to invoke the grievance procedure of a collective-bargaining agreement must meet only a liberal discovery-type standard of relevancy; the information must be turned over if there is a probability that the desired information is relevant and ''would be of use to the union in carrying out its statutory duties and responsibilities.'' This standard does not require any finding at all about the merits of the union's claims under the contract. *Acme*, supra, 385 U.S. at 437.

In the instant case, the facts show that Union President Lucas received complaints and inquiries about the photographing of unit employees. He called Hayes to ask what was going on. Hayes offered reassurances that it was nothing and that it was routine. Lucas said he hoped Hayes was not playing games. Clearly, Lucas was asking for information which might have helped him to register a complaint on behalf of the employees he represented; he might even have filed a grievance under the collective-bargaining agreement. When Hayes decided not to tell Lucas the truth about the reason for photographing unit employees, he took it on himself to do what the Supreme Court has forbidden in *Acme*; although he conceded that it would have been important to the Union to know what the photographs were for, he decided that the Union had no right to the information.[21] I find that Respondent thereby denied the Union information that was probably relevant and would have been of use to the Union in carrying out its duties.

Respondent urges that the photographing of employees is not a mandatory subject of bargaining and for that reason the Company was under no duty to comply with the Union's request for information. I find that the facts show that some employees were told to stay in their work areas because a photographer was coming, some employees were told to pose in certain ways and some employees were told to look as though they were performing their daily work. Although employees were not threatened with discipline if they failed to have their pictures taken, none of them were told the truth about the purpose of the photography and all of them were faced with one or two supervisors who urged them to have pictures taken.[22] I conclude that, in the circumstances, the

[20] See also *Fermont*, 286 NLRB 920, 921 (1987).

[21] Hayes did not testify what factors he used to reach the conclusion that the Union had no right to the information.

[22] There is no evidence that any employee was told, in plain English, that the pictures which were about to be taken were purely a matter of choice. Indeed, the evidence shows that employees were cajoled into posing for the photographer.

employees would reasonably believe that it was part of their obligation to the Company to submit to the photography.[23]

The Board has recently considered whether the filming of employees is a mandatory subject of bargaining in *E. I. du Pont & Co.*, 301 NLRB 155 (1991). In that case, the Board held that the Employer need not bargain with the union over the company's request that a few employees give a filmed interview concerning newly promulgated management principles for inclusion in a videotape. The *E. I. du Pont* case is distinguishable in several respects. That case was decided by Administrative Law Judge Zankel on the basis that the videotaping was analogous to an attitude survey and constituted direct dealing with the employees, and that the criteria for a mandatory subject of bargaining under *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), had been met. The Board found contrary to the judge. The Board held that the employer had not engaged in direct dealing because there was no attempt to undermine the union. The Board found that the videotaping was not a mandatory subject; the employees understood what the taping was for and that they could decline to participate, and the taping was not part of their regular job duties. On this basis, the Board concluded that the matter was not of ''deep concern'' to the employees and was not ''plainly germane'' to the working environment under the test of *Ford Motor Co*. Further, the Board found that the videotaping was within the sphere of managerial prerogative because its purpose was to inform both unit and nonunit employees of newly formed management principles without any attempt to erode the status of the union nor to change an important facet of the employees' daily lives. A reading of the Board's decision makes it clear that both the element of voluntariness and the lack of any motive to erode the status of the union as the exclusive representative were important to the Board's ultimate conclusions.

In the instant case, unlike the facts in *E. I. du Pont*, there was no voluntary participation by the unit employees because they were deceived into having their pictures taken by the excuse that the photographer merely wanted to use up his film or by a vague reference to ''headquarters,'' and the employees were not told that their likenesses would be used in a videotape. The purpose of the deception and of the photography was to surprise the unit employees with their own pictures in an antiunion film to be shown 2 days before the decertification election. The aim of the film was to aid in decertifying the Union and to change an important part of the unit employees' working lives. The fact that the employee's photographs were to be used in furtherance of the Company's effort to remove the employees' union representative makes the picture taking of ''deep concern'' to the employees and ''plainly germane'' to the working environment as contemplated by the decision in *Ford Motor Co.*, supra at 498. Few circumstances can have as much effect on the working environment of employees as the presence or absence of union representation. Further, it requires only an exercise of common sense to recognize that the use of a person's likeness is necessarily of ''deep concern'' to the individual. Here, almost all the members of the unit were photographed, making the issue one that affected nearly every employee represented by the Union. Finally, the decision to take the employees' pictures and use them in a video was not a managerial decision at the core of entrepreneurial control; as the Ford Motor Company is not in the business of selling food to its employees neither is Sony in the business of photographing its employees for use in videotapes. *Ford Motor Co.*, supra at 498.

In the instant case, if Hayes had replied truthfully to Lucas' inquiry about what was going on, Hayes might have requested to bargain about the taking of photographs for inclusion in the videotape. However, Lucas was denied the proper information and thus had no opportunity to request bargaining about the subject. Of course, it is a violation of the duty to bargain in good faith to give a false and misleading answer in response to a union's information request. *Assn. of D.C. Liquor Wholesalers*, 300 NLRB 224 (1990).

I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the requested information concerning the photographing of employees and by giving false and misleading information to the Union.

4. The election day raffle

The General Counsel contends that the value of the prizes was so substantial as to divert the attention of the employees away from the election and its purpose. The General Counsel further contends that the value of the prizes was so substantial as to inherently induce voters to vote in support of the Company's position.

Although company raffles are permitted in the context of Board elections, the Board has held in particular cases that raffles may interfere with an election and may also interfere with employees' Section 7 rights.

For example, in *Smith International*, 242 NLRB 20 (1979), the Board sustained an objection to the election based on the conduct of an election day raffle by the employer. Out of 856 eligible voters, 804 had cast ballots. The Board found that, id. at 20–21:

> [T]he size of the leading prize [an all-expense paid trip to Hawaii or Disneyland or Disneyworld] is so great as to divert the attention of employees away from the election and its purpose. In addition, such a substantial prize inherently induces those eligible to vote in the election to support the Employer's position.

In *E. A. Nord Co.*, 276 NLRB 1418 fn. 2 (1985), the Board found that in a unit where 1172 employees voted, five prizes of $252 ''were so substantial that the raffle constitutes objectionable conduct.'' In *National Gypsum Co.*, 280 NLRB 1003 (1986), the Board set aside an election conducted in a unit of 88 voters, where six raffles were held with prizes of $261 in cash and $270 television sets. Although the Board relied in part on the fact that the employer required raffle participants to identify themselves on their entry forms, it also relied on the fact that the prizes ''were of substantial value.'' In *Houston Chronicle Publishing Co.*, 293 NLRB 332 (1989), the Board found that a $250 prize was substantial in a unit where 176 employees voted.[24]

[23] As shown in the videotape, the pictures of the unit employees are apparently at their work stations, seemingly engaged in their daily tasks: many of them seem to be typing at a computer, talking on the telephone, perusing files, and consulting with their coworkers.

[24] These cases may be compared with others where the Board did not set aside the election on the basis of election raffles: In *Holly-*

In contrast to *National Gypsum*, supra, where as a prize a television set was not permitted, some earlier cases apparently approve the raffle of televisions. In *Elgin Butler Brick Co*., 147 NLRB 1625, 1627 (1964), the Board declined to set aside the election where the employer had conducted a raffle of a television set for all those who voted. The decision does not provide any glimpse into the Board's rationale. Similarly, in *Tunica Mfg. Co*., 182 NLRB 729, 743 (1970), the raffle of a television set was held to be not objectionable on the basis of precedent but with no discussion of the rationale, although other objectionable conduct and certain unfair labor practices were found sufficient to interfere with employee rights under the Act.[25]

I conclude that although earlier cases hold that the raffle of a television set was not of itself the basis for sustaining an objection, more recently the Board has engaged in a case-by-case analysis to determine whether any raffle prizes, including television sets, constitute objectionable conduct.

In the instant case, the record shows that the average (mean) wage of employees in the unit was $385 per week. The list price of the 27-inch television set was $1299.99 and the employee discount price was $617. The discman was listed at $279.95 and employees could purchase it for $175.95. In prior cases, the Board has looked to the price of the ''leading prize'' in a raffle to see if the value was so substantial as to divert the attention of the employees from the election. I find that even at a discount, a television valued at $617, was substantial in that it represented, on average, much more than 1-1/2 of a week's earnings for the unit employees. Moreover, employees were aware that they were being offered an item publicly valued by Sony at $1299.95: the computer, which employees used to order discount items, showed both the list price and the discount price. If, as Respondent contends, the list price was immaterial to Sony employees, then the Company would not have provided it to them when they purchased discount merchandise. It is reasonable to conclude that Respondent informed its employees that the goods they were able to obtain at a discount actually listed for a much higher price because this helped the employees to understand the true value of what they were receiving. Even if, as the Company urges, ''no one'' pays list price, that price is used as a benchmark. A prize that listed for a price 3-1/3 times the average weekly earnings of unit employees is quite substantial.

Respondent further argues that because it regularly conducted raffles the instant raffle in connection with the election could not have interfered with a free and fair election. The evidence shows that the Company usually offers its employees raffle prizes when it plays host to a summer picnic and a Christmas lunch. Raffle prizes are also used as an inducement to persuade employees to contribute to the United Way drive. However, these prizes are available to all employees, both rank and file and managerial, unlike the instant prizes which were available only to unit members who voted in the election. In the deauthorization election held just 4 months before the decertification election, no raffle was conducted. Thus, unit employees would reasonably conclude that the instant raffle was unlike any others previously available to them.

Respondent presented evidence concerning the rate of inflation. This was an attempt to show that the dollar amount at which the Board has previously found that prizes interfere with an election should be adjusted to account for inflation. Respondent thus takes a mechanical view of the analysis to be conducted. However, I find that the proper analysis is one made on a case by case basis, taking into account the particular circumstances of the employees at issue and viewing the value of the prizes in the context of the Employer's entire campaign. The facts, here, show that Respondent certainly intended the unit employees to be impressed with the value of the prizes offered to them in the election raffle: The videotape shown to employees specifically mentioned the prizes as a reason ''to vote'' and ''to vote no.'' Further, this was a relatively small unit of about 140 employees and an employee could reasonably conclude that the chance of winning the leading prize was fairly good. Further, although Respondent tried to give the impression that Sony employees would not be overly impressed with the prizes being offered to them, the testimony shows that at several locations about half of those voting asked where to pick up the raffle tickets. Finally, although Respondent offered much theoretical background for its contention that the prizes were not substantial and almost humdrum, it did not show how many unit employees had actually purchased a 27-inch television set through the Company's store network nor did it show what the average price of purchases per employee might be in a given time period. Thus, I conclude that the prizes offered were so substantial as to interfere with the employees' free choice of a collective-bargaining representative and I shall make the appropriate findings below in the discussion of the representation case.

In *Grove Valve & Regulator Co*., 262 NLRB 285, 303 (1982), the Board found that an election raffle with large prizes coerced the employees in violation of Section 8(a)(1) of the Act. In *Grove*, as in the instant case, the employer cited a history of prior raffles, but these had been open to all employees. Further, the employer's arguments relating to inflation were not found to be persuasive on the issue of the value of the prizes.

Here, Respondent showed its employees a videotape 2 days before the election which told them that Sony was adding ''a little incentive to everyone to vote. . . . First prize is a new TV made by the best TV maker in the world . . . . Besides the TV or the CD player, you've got a lot of reasons to vote and a lot of reasons to vote no.'' Although there are many ways to parse this sentence, it must be remembered that the employees did not read this message, they heard it near the end of a 30-minute film. In the circumstances, it is reasonable to conclude that many of them would have heard a message which told them that a reason for voting against the Union was the fact that Sony was giving away valuable prizes through an election day raffle. I find that the substantial nature of the leading prize in the raffle coerced the employees in violation of Section 8(a)(1) of the Act. *Grove Valve & Regulator Co*., supra. I make no finding concerning

wood Plastics, 177 NLRB 678, 681 (1969), the employees had a 1 out of 95 chance of winning an $80 bag of groceries; in *Buzza-Cardozo*, 177 NLRB 589 (1969), 350 voters had a chance to win groceries worth $84; and in *Thrift Drug Co*., 217 NLRB 1094 (1975), prizes ranged from $10 to $40.

[25] *Marathon Le Tourneau Co*., 208 NLRB 213, 223–224 (1974), does not address to any length the issue whether the raffle of a television is substantial because the conduct of the raffle was otherwise found to be objectionable.

the wording of the videotape because the General Counsel has not alleged any violation based on the language.

III. THE OBJECTIONS TO THE ELECTION

As set forth above, the Union filed objections to the election, and a number of them remain to be disposed of. Objections 1, 2, 3, 6, and 12 are based on conduct, which I have discussed above. I have found that Respondent unlawfully photographed unit employees without informing them of the purpose for which the pictures would be used and included those pictures in an antiunion videotape shown to unit employees 2 days before the decertification election. I have further found that Respondent unlawfully refused to provide information to the Union after employees and shop stewards complained to the Union about the photographing. I have also found that Respondent unlawfully coerced employees by announcing and conducting an election day raffle with a substantial leading prize. The value of the leading prize was so substantial as to divert the attention of the employees away from the election and its purpose and was so substantial as inherently to induce voters to vote in support of the Company's position. To the extent that Objections 1, 2, 3, 6, and 12 are based on conduct found to violate the Act, I shall recommend that they be sustained.

Objection 8 states, ''On March 14, 1990, at the Paramus locations, the Employer stationed an agent on the line of march to the poll so that the employees observed the agent's raffle tickets shortly before entering the polling area.'' Objection 9 states, ''While the polling at Paramus took place on March 14, 1990, the Employer's raffle distributor and agent stated that the raffle was only for special people which implied that they were rewarding employees for voting against the Union.'' Both of these objections are based on the testimony of Al Guglielmo, secretary-treasurer of Local 888. All the testimony here, taken together, shows that the raffle distributor was well away from the polling location, although she was in an area that some employees might pass on their way to vote. If the raffle were otherwise proper, this alone would not be grounds for sustaining the objection. Guglielmo testified that when he arrived at the Paramus location he observed a young lady with raffle tickets and he asked her if he could purchase a ticket. The lady responded that they were free and when Guglielmo then asked for his ticket, she replied that they were for Sony people only. Thereupon, Guglielmo said that was nice and that he would get the rest of the staff, but the young woman said that the tickets were for ''special people.'' I do not find that this vague reference implied that Sony was rewarding employees for voting against the Union. I shall recommend that Objections 8 and 9 be overruled.

I have found above that the acts described in Objections 1, 2, 3, 6, and 12 constitute unfair labor practices which occurred during the critical preelection period. I further find that such conduct reasonably tended to interfere with the employees' free and untrammeled choice in the election held on March 14 and 15, 1990. Accordingly, I recommend that the election be set aside and that Case 22–RD–984 be remanded to the Regional Director for Region 22 to conduct a new election when he deems the circumstances permit. I shall not recommend the issuance of a bargaining order under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). Although I have found both unfair labor practices and conduct sufficient to set the election aside, I do not find that the conduct was ''outrageous'' nor that the possibility of erasing the effects of Sony's conduct and ensuring a fair election by the use of the Board's traditional remedies is slight.

IV. REQUEST TO SEAL VIDEOTAPE FROM PUBLIC INSPECTION AND COPYING

Respondent seeks an order sealing the 30-minute campaign videotape which was introduced into evidence here. In a separate memorandum submitted on this point, Respondent argues that if the order sealing the videotape is not granted, ''copies of the videotape now in the possession of the Board and the Union's counsel could be subject to the 'fair use' provisions of 17 U.S.C. § 107, such as television broadcasting . . . under the guise of news reporting, and could also be made available for viewing in private settings.'' Since Sony has not obtained a copyright registration for the videotape because ''registration requires a public filing of the videotape with the Copyright Office and resulting access and viewing by the public,'' it points out the ''the threat of an infringement suit offers virtually no deterrence.''

Finally, Respondent states, ''But for this proceeding, Sonam would have been able to maintain complete control of the videotape.''

The Supreme Court stated in *Nixon v. Warner Communications*, 435 U.S. 589 (1978), that ''the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.'' Id. at 597, citations omitted. The Court explained that the interest supporting this right was found, for example, ''in the citizen's desire to keep a watchful eye on the workings of public agencies'' and on the intention of the press to publish information concerning the operation of government. Id. at 598. The Court recognized limitations on the right to inspect and copy judicial records ''where court files might have become a vehicle for improper purposes'' such as the gratification of spite or scandal through the release of details of a divorce case, by the repetition of libelous statements, or the revelation of business information that might harm a litigant's competitive standing. The Court instructed that the decision on the common law right of access ''is one best left to the sound discretion of the trial court'' based on the facts and circumstances of each case. Id. at 599.

There is no scandalous or libelous material in the videotape here. Further, none of Sony's trade secrets are revealed on the tape. This film was made to be shown to 140 members of a clerical unit, none of whom by definition is a confidential employee, and I find no support in the facts or circumstances for the notion that any portion of the tape should be kept secret. The transcript of the tape has also been made a part of the record and large portions of the tape are quoted in the briefs and in the instant decision. The videotape is a central piece of evidence in the instant case. A viewing of the actual tape will serve to enhance understanding of the case and any decisions which may arise as a result of these proceedings.

Respondent's stated reasons for shielding the videotape from public view amount to a wish to maintain complete control over the tape and to keep its contents secret. I conclude that Respondent has not shown any reason for sealing the videotape and and I find that it has no right to any order

prohibiting inspection or copying of the videotape as part of the evidence here.

CONCLUSIONS OF LAW

1. By photographing employees and using the photographs in its antiunion videotape without the employees' consent, Respondent coerced the employees in violation of Section 8(a)(1) of the Act.

2. By refusing to furnish the Union with information it requested concerning the photographing of employees and by giving a false and misleading response to the request, Respondent violated Section 8(a)(5) of the Act.

3. By conducting an election day raffle with substantial prizes, Respondent coerced its employees in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Sony Corporation of America, Mahwah, Teaneck, Paramus, Park Ridge, Woodcliff Lake, and Fort Lee, New Jersey, and New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Photographing its employees and including their photographs in antiunion videotapes without the employees' consent, refusing to furnish necessary and relevant information to the Union and giving a false and misleading response and conducting election day raffles with substantial prizes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the necessary and relevant information to the Union.

(b) Post at its facilities in Mahwah, Teaneck, Paramus, Park Ridge, Woodcliff Lake, and Fort Lee, New Jersey, and Nine West 57th Street, New York, New York, copies of the attached notice marked ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Objections 1, 2, 3, 6, and 12 be sustained and that Objections 8 and 9 be overruled, that the election conducted on March 14 and 15, 1990, be set aside,and that Case 22–RD–984 be remanded to the Regional Director for Region 22 to conduct a new election when he deems the circumstances permit.

[26] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''